1943.

File No D.D of A 1/43.
Pt III

Legal Deptt

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Subject: Opinions under the Defence of India Act 1939

P.54
E

(Please see Pt II for previous pps.)

File No. D D of A 1/43
Pt III

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C O N T E N T S.

Legal Department File No. O. Defence of India/1943.- Pt.III.

Sr. No.	R.I. / O.No.	Subject.	Pages.
	O. Def. of India / 1943- Pt.III.	Opinions under the defence of India Act, 1939.	
		Cl.(e) rule 34(6) R. of I. Rules.	
1.	6609 30-9-43.	Interpretation of term "prejudicial Act".-	1-16.
2.	7073 23-10-43.	Whether Bombay Cotton Cloth Dealers Licensing Order 1943 applies to Cloth Shops run by Excise Deptt. W.Khandesh.	17.
3.	G.R.H.D.No.748614 1-11-1943.	Trial of Cases under Criminal Law Amendment Amending Ordinance 1943.	19-20
4.	6888 15.10.43. 8132 4.11.43.	Disclaim of Sedition that Public disorder or the reasonable anticipation or likelihood of public disorder is the gist of the offence -	21-37.
5.	8298 9.11.43	Whether article "Military help for appeasing hunger" appearing in Lokmanya Comes within the purview of Cl.(e)(ee) or (g) of rule 34(6).	39-40.
6.	8331 11.11.43.	Paying guest by the tenant would not be covered by Rent Restriction or Hotel and Lodging Control Orders 1942.	41-43.
7.	8458 16.11.43.	Agreement by Mr. Frank to take over premises of Sir Shah Nawaz Bhutto for 5 years - valid claim for compensation.	45-48.
8.	8642 22.11.43.	"Prabhat" is not a newspapers as defined in Cl.2(a) if newspaper Control Order 1942.	49-52.
9.	8691 24.11.43	Intention of the expression imported into xxxx or exported to any place out of the ratioped area -	53.

P.T.O.

Sr. No.	R.I. / O.No.	Subject.	Pages.
10.	8738 26.11.43	Whether non compliance with order issued under sub Cl.(b) of rule 26(5B) of D. of I. Rules is an offence in view of the judgment of Federal Court.	55-57.
H	368-Confl. 1.12.43.	Order passed under Sub Cl. (B) of rule 26(5B) intra Vires.	59-61.
12.	8867 1.12.43.	Whether the Controller has authority to enter personally upon premises for purpose of an inquiry under Sub Cl. (2) of Cl.3 of Hotels and Lodging Houses Control Order 1942.	63.
13.	8853 1.12.43.	M/S. Thomas De La Rue & Company's structures without the permission of the Bandra Municipality.	65-70.
14.	9071 8.12.43.	Whether Commissionxx Agents purchasing or selling cloth for their Constituencies one dealers within the meaning of Bombay Cotton Cloth Dealers Licensing Order, 1943.	71-72.
15.	9163 2.43.	Whether the Collector can entertain the appeal made to him after 15 days from the date of order of the Rent Controller.	73-75.
16.	9070 8-12-43.	Whether or not meals provided at Clubs and Hotels on dance nights would be infrigment of F.D. (Suppl.) notification No.390-IIA,dt.28.10.43.	77.
17.	9187 15.12.43.	Discretion in the Rent Controller under proviso to Cl.8 of Bom.Rent Restriction Order 1942 has been curtailed.	79-81.
18.	399-Confl. 27.12.43.	Whether Collector of Bombay can cause certain premises to be inspected by the Supdtg. Engineer Central P.W.D.under rule 132 D. of .. Rules.	83-84.
19.	9459 27.12.43.	Whether orders in F.D. (S) notifn. nos.11/7-II and 383-II dt.3/7/43 are applicable to the specified goods deposited or stored in bonded Wabehouses.	85-86.

20.

Sr.No.	R.I. / O.No.	Subject.	Pages.
20.	9484 28.12.43.	Whether order to display the fair rates is operative during the period of appeal. -	87-89
21.	397-Confl. 24.12.43.	Whether warning notice gives the landlord any claim for rent in respect of the period intervening between the date of notice or subsequent vacation of the date of requisitioning.	91-92.
22.	9591 31.12.43,	Whether poem "The Sun has set" in form against Lord and Lady Linlithgow" Constitute defamation.	93.
23.	9605 31.12.43.	Whether permits are necessary for routine dances when no x tables distribution take place.	95.
24.	7998-A 3.11.43.	Whether Prince of Wales Museum or any other building can be requisitioned to house Elphinston High School.	97-103

5-Cs.
L.V.V.
30/8.

Any act which is intended or is likely to bring into hatred or contempt, or to excite disaffection towards, His Majesty or the Crown Representative or the Government established by law in British India or in any part of His Majesty's dominions is a "prejudicial act", under clause (e) of rule 34(6) of the D. of I. Rules. It is an offence under rule 38 of the said Rules for any person to do any "prejudicial act" without lawful authority or excess.

2. In Niharenudu v. Emperor, 1942 A. I.R. p. 22, the Federal Court considered the provisions of section 124A, I.P.C. and rule 34(6) of the D. of I. Rules and reviewing the English decisions on the law of sedition", Gwyer C.J. observed as follows:

"It will be observed that the first of these Acts i... (i.e. the prejudicial Act" mentioned in clause (e) of rule 34(6) is described in precisely the same language as is used to describe the offence of sedition in section 124A, I. P.C. We were invited to say that an offence described merely as a " prejudicial act" in the Defence of India Rules ought to be regarded differently from an offence described as "sedition " in the Code , even though the language describing the two th ngs is the same. We cannot accept this argument. Sedition is none the less sedition because it is describ-ed by a less offensive name and in our opinion the law relating to the offence of sedition as defined in the Code is equally applicable to the prejudicial act defined in the Defence of India Rules. We do not think that the ommission in the Rules of the three "Explanations" appended to the section of the Code affects the matter. These are added to remove any doubt as to the meaning of the Legislature; they do not add to or subtract from the section itself; and the words used in the rules ought to be interpreted as if they had been explained in the same way.

"The words as well as the acts, which tend to endanger society," it has been observed, "differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assualt. In the present day meetings and processions are held lawful which 150 years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before (Lord Sumber in (1917) A.C. 406 at p. 466). The right of every organized to protect itself against itself against attempts to overt row it cannot be denied; but the attempts which have seemed to one age may be the subject of ridicule in another. Lord Holt was wise man and a great Judge; but he saw nothing absurd in saying that no Government could subsist, if men could not be called to account for possessing the people with an ill-opinion of the Government; since it was necessary for every Government ~~account for possessing the people with an ill-opinion of~~ that the people should have a good opinion of it. Hence, many judicial decisions in particular cases which were no doubt correct at the time when they were given may well

be inapplicable to the circumstances of today. The time is is long past when the mere ~~ex~~ criticism of Government was ~~th~~ sufficient to constitute sedition, for it is recognised that the right to utter honest reasonable criticism is a source of strength to a community rather than a weakness. Criticism of an existing system of Government is not excluded, nor even the expression of a desire for a different system altogether. The language of section 124A, Penal Code, if read literally, even with the explanations attached to it, would suffice to make a suprising number of persons in this country guilty of sedition; no one however supposes that it is to be read in this literal sense. The language itself has been adopted from English law, but it is to be remembered that in England the good sense of jurymen can always correct extravagant interpretations sought to be given by the executive Government or even by Judges themselves: and if in this country that check is absent, or practitically absent, it becomes all the more necessary for the Courts when a Case of this kind comes before them, to put themselves so far as possible in the place of a jury, and to take a broad view, without refining over much in applying the general principles which underlie the law of sedition to the particular ~~mm~~ facts and circumstances brought to their notice. What then are these general principles? We are content to adopt the words of a learned Judge, which are to be found in every book dealing with this branch of the criminal law:

"Sedition----embraces all those practices, whether by word, deed or writing, which are calculated to disturn the tranquility of the State and lead ignorant persons to subvert the Government. The objects of sedition generally are to induce discontent and insurrection, to stir up opposition, to the Government and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war, to bring t into hatred or contempt the sovereign or Government, the laws of the constitution of the realm and generally all endeavours to promote public disorder". (Fitzgerald J. in (1868) 11 Cox. C.C. 54 at page 55) . . ..We think that the passage accuragely states the law as it is to be gathered from an examination of a great number of judicial pronouncements." The first and most fundamental duty of every Government is the preservation of order since order is the condition precedent to all civilization and the advance of Human happiness. The duty has, no doubt, been sometimes performed in a such a way as to make the remedy worse than the disease; But it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of Government that in our opinion, the offence of sedition stands related. It is the answer of the State to those who, for the purpose of attacking or subverting it, seek (to borrow from the passage cited above) to disturb its ~~tranquilix~~ tranquillity to creat public disturbance and to promote disorder, or who incite others to do so. Words deeds or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law ceased to be obeyed because no respect is felt any longer for them only anarchy can follow Public disorder or the reasonable anticipation, or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder, or must be such as to satisfy reasonable men that that is their intention or tendency."

3. The two disquieting passages in Gwyer C.J.'s judgment are-

(1) where he links the offence under clause (c) of rule 34

(6) of the D. of I R.les with the offence of sedition under section

sedition under section 124A of the Penal Code, and

(2), where he lays down the dictum that "public disorder or the reasonable anticipation or likelihood of public disorder is the gist of the offence."

4. The judgment states in effect that the offence under rule 34(6) of the Defence of India Rules is substantially the same as that under section 124A of the Indian Penal Code. Gwyer. C.J. seems at times to regard sedition as something determined not by the language of the section of the Indian Penal Code or of the rule in question but as something apart and in the light of which these two enactments of law are to be interpreted. If regard is to be had to the language of section 124A and clause (e) of rule 34(6) , there is substantial differen-ce between them . In the offence dealth with in section 124A intention is the essence of the offence. For example, a man may say something likely to bring Government into contempt or hatred, but if he can show that he did not intend to do so , there would be no offence. Under clause (e) of rule 34(6) no such defence would be open to the accused. If what he said was likely to bring Government into hatred or contempt, then under the clause there would be an offence whether or not he intended to excite those feelings. In short, the offence under clause (e) of rule 34(6) includes much more than the offence under section 124A so far as exciting hatred and contempt is concerned. But Gwyer C.J. makes the sweeping observation that the offence is the same. In fact, he denies the right of Government to go beyond the limit of section 124A in dealing with objectionable publishable publications. It is very doubtful if he has any right to disregard the plain wording of clause (e) of rule 34(6) in this manner. In Annie Besant V. Emperor (1916) 39 Mad. 1085 the Madras High Court held that section 41 of the Indian Press Act, went beyond the provisions of section 124A of the Indian Code. In that case it was not even suggested to the court that it was beyond the power of the Legislature to exceed the limits of that section. Ayling J. observes at

at page 1130.

"That the wording of the section is very wide is however undeniable ; and in some respects it clearly goes beyond the provisions of the Indian Penal Code. The governing words "are likely or may have a tendency" undoubtedly leave the question of intention quite immaterial: and confirm our attention to the natural effect of the words without referrence to what the writer meant, or wished to be understood."

Sumilarly the officiating Chief Justice in that case held that Mrs. Besant had no intention to disseminate disaffection or hatred against the Government of the Country, but that her writings had that tendency and therefore the ~~xxxx~~ offence was committed. There was some doubt in that case how far intention could be excluded from section 4 of the Indian Press Act, Act, 1910 because although it was excluded from clause (c) of that section Explanation 2 of that section did bring in the question of intention. But so far as clause (e) of rule 34(6) of the D. of I Rules is concerned, there is no such Explanation and both intention and likelihood are clearly made offences. It is true that in the appeal to the Privy Council from the Madras case it was contended that section 4 of the Press Act of 1910 was ultra vires. ~~xxxx~~ but not on the ground it exceeded the limits of section 124A of the Penal Code. Nor was it suggested that the offence under section 124A and section 4 of the Press Act were identical. The Privy Council merely said that section 124 A was of considerable held in interpreting section 4.

5. Coming now to the second disquieting passage in the Federal Court judgment it is by no means clear that the dictum laid down by Gwyer C.J. is justified either on the basis of the English law or on the basis of the Indian law. One of the leading English cases on the point is Reg. v. Sullivan (1868) 11 Cox. 44. In that case Lord Fitzerald while addressing the grant jury stated broadly the general principles which underlie the law of sedition. Some of this observations have already been quoted by Gwyer C.J. in his judgment. In his charge to the jury Lord Fitzerald spoke as follows:-

"Without defining sedition further than for the purposes of this trial, I have to tell you if you in your honest judgment come to the conclusion that these publications, or any of them, are calculated and intended to excite hatred of the Government and the

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30-8

Government and the Administration of the laws, or create dissatisfection, or disturb the public peace, then they are seditious libels. I do not think I can put the matter plainer than that."

This observation was made in respect of the specific allegations levelled against the accused in that case. It was there alleged that the defendant intended by certain publications and prints to excite hatred or contempt of Her Majesty's Government, xd and the administration of the laws; and further, that these prints were intended to create dissatisfaction, to excite hatred and contempt of the Government and to disturb the tranquillity of the realm. It is significant to note that nowhere in his address to the jury did Lord Fitzerald say that in deciding whether the accused did excite hatred or contempt of the Government the jury should consider whether there were a likelihood of public disorder the whole of the address to the jury in that case is read and when the nature of the charge is borne in mind it does not appear that case justifies in the proposition that the likelihood of public disorder can serve even in English law as a touch-stone of sedition when the charge against accused is that he intended to arouse hatred and contempt against Government. I know of no English law where a judge in addressing the jury has made the Federal Court's dictum the test of sedition generally or when the charge against the accused was that he had attempted to excite hatred and contempt. The definition of 'sedition' given in Russel on Crimes does lend some support to the Federal Court's dictum. It is defined by the author as follows:-

> " 'Sedition' consists acts, words or writings, intended or calculated, under the circumstances of the time to disturb the tranquillity of the State., by creating ill-will, discontent, disaffection, hatred, or contempt, towards the person of the king, or xxxx towards the constitution of Parliament, or the Government or the established institutions of teh country, or by exciting ill-will between different classes of the King's subjects, or encouragin any class of them to endeavour to disobey, defy or subvert the laws xf or resist their execution, or to create tumults or riots or to do any act of violence or outrage, or endangering the public peace."

Everything in that definition is subordinate to the clause "to disturb the tranquillity of the State". Whether this definition

is strictly correct is doubtful. If it is correct, it would justify the test of an intention or likelihood of disturbing the tranquillity of the State. But one may have the intention ofdisturbing the tranquillity of the State not only by intending to cause public disorder in the immediate future, but also by rendering people sufficiently hostile to Government to create trouble if opportunity offers.

6. The definition given in Halsbury's Laws of England substantially Sir, James Stephen's definition- "Sedition is a misdemeanour at common law consisting of acts done, words spoken and published, or writings capable of being a libel published, in each case with a seditions intention." A seditions intention is the essence of the offence and it is defined as an intention (1) to bring into hatred or contempt, or to excite disaffection against, the King or the Government and Constitution of the United Kingdom, or either House of Parliament or the administration of justice; or (2) to excite the King's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established; or (3) to incite persons to commit any crime in general disturbance of the peace; or (4) to raise discontent or disaffection amongst his Majesty's subjects or (5) to promote feelings of ill-will and hostility between different classes of such subject". (Halsbury's Laws of Eng land, 2nd edn. Vol. IX, page 302). This definition has often been approved of in English cases and seems to be one commonly used as a comprehensive definition-.

7. It is no doubt true that in England there is now a more liberal attitede towards criticisms of Government. What would be seditions libels in the 18th 19th centuries would not now be regarded as libels by the Courts and would be disregarded by Government. As the Federal Court rightly points out, judges in England now would not agree with Lord Holt's dictum in R.V. Tutchin (1904) 5 St. Tr. 532: "If persons should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for all Governments that the people should have a good opinion about it." Lord Ellenborough, expressly following this decision, told the jury in R.V. Cobbet (1804)

Cobbet (1804), 24 Howell's St. Tr. 49; "It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the Government into disesteem, whether the expedient be by riducule or obloquy,.....it is a crime." These two cases are still quoted as authorities, but text books emphasise that they cannot nowadays be taken literally and must be interpreted with reference to political conditions at the time these trials. In Russel on Crimes there is the statement: "Apart from these acts, reprosecutions under which are now never undertaken, under the law of sedition as now interpreted there is perfect liberty to decide the constitution or to advocate its alternation provided that advocacy is not calculated or or intended to produce civil commotion or insurrection." Whether the Government in India is such that it can afford to disregard malicious attacks to the same extent as the Government in England is doubtful. And although there is a more liberal attitude towards attacks on Government, no court so far as I know, has yet laid down that in deciding whether the attack is calculated to excite hatred or contempt, the test should be whether there is a likelihood or public disorder. It is possible within the terms of section 124A of the Penal Code for Courts to take a liberal view without disregarding the plain language of that section.

8. Whatever be the justification in English law for the Federal Court's dictum, it seems to me that it runs counter to Indian law in cases where the charge is exciting hatred and contempt against Government. In England, there, is no statutory definition of sedition and the law of sedition is to be gathered from the common law as propounded in the various cases. On this point the remarks of Strachey J. in 22 B.L.R. 112 at p.133 are pertinent:-

"In the first place, in construing the section I do not propose to discuss the English law of seditious libel, though I have most fully considered the cases to which

which Mr.Pugh has referred, and the writings of Sir James Stephen and others on the subject. I believe that the explanation which I shall give you is not in any way inconsistent with the best English authorities; but in England the offence of seditions libel is not statutory offence defined by Act of Parliament, but a common law misdemeanous elaborated by the decisions of Judges.

In this country the law to be applied is the Penal Code." The English law is therefore subject to the elaboration of judges and in perhaps more sensitive to changes and political conditions and in public opinion. The law in India need not shut its eye to these changes, b t on the other hand judges cannot neglet the plain wording in the statutory definition of sedition in section 124 of the Penal Code. It is for the Legislature to effect any such changes in the law of sedition as would clearly go beyond the plain meaning of the present words. This test of Public disorder has already appeared in two famous cases in India and been decisively rejected on both occasions. Both these cases went before the Privy Council and the decisions were upheld by the Board. The test proposed in those cases was not exactly the same as that down by the Fede al Court.. It was argued there that in deciding whether a writer intended to excite disaffection or contempt or hatred, the test was whether he <u>intended</u> to incite public disorder. It is much more in keeping with the language of section 124A to make <u>intention</u> and not <u>likelihood</u> the test. Indian courts in interpreting the Federal court judgement might quite conceivably regard it as authority only for the view that the intention to excite public disorder is the test of sedition and neglet the dictum that the likely hood of public disorder is the gist of the offence. The Federal Court follows up its dictum by saying: "The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their <u>intention</u> or tendency." In regard to the speech in question the Federal Court remarked: "We cannot regard the speech taken as a whole as inciting those who heard it ..... to attempt by violence or by public disorder to subvert the Government....." Apparently the Court was there applying the test of intention to excite disorder. However, in this less objectionable form the test has been rejected in the following two cases: the first case is Queen Empress v. Bal Gangadhar Tilak (1897) 22 Bom.112.

22 Bom. 112. In that case Strachey J. his charge to the jury said:

"It is true that there is before you a charge against each prisoner that he has actually excited feelings of disaffection to the Government. If you are satisfied that he has done so you will, of course, find him guilty. but if you should hold that that charge is not made out, and that no noe is proved to have been excited to entertain feelings of disaffection to the Government by reading these articles, still that alone would not justify in acquitting the prisoners. For each of them is charged not only of exciting feelings of disaffection, but also with attempting to excite such feelings. You will observe that the section places on absolutely the same footings the successful exciting of feelings of disaffection and the unsucessful attempt to excite them, if you find that either of the prisonershas tried to excite such feelings others, you must convict him even if there is nothing to show that he succedded. Again, it is important that you should fully reasose another point. The offence consists in exciting or attempting to excite in others certain bad feelings towerds the Government. It is not exciting or attempting to exoite mutiny rebellion, or any sort of actual disturbance, great or small. Whether any disuurbance or outbreak was caused by these articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authrority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which aspplainly as possible makes the exciting or attempting to excite certain feelings, and not inducing or attempting to induce to any course of action such as rebellions or forcible resistance, the best of guilt. I can only account for such a view by attributing it to a complete imsreading of the explanation attached to the section and to a misapplication of the explanation beyond its true scope."

The accused in that case were convicted and the High Court refused leave to appeal. The judgment of the Full Bench refusing leave to appeal is reported in 22 Bom. 147. Strachey J.'s charge to the jury was vehemently attached and the only ground of appeal was that there had been misdirection. Farran C.J. Said:

" The ground upon which Mr. Russel has asked u to certify that this is fit case to be sent to Her Majesty in Council, is that there has been a misdirection, and he basedhis argument on one major and two minor grounds. The major ground was that the section cannot be said to have been contravened unless there is a direct incitement to stir up disorder or rebellion. That appears us to be going much beyond the words of the section, and we need not say more upon that ground.

One of the accused then appealed to the Privy Council where Strachey J's judgment was again considered. It was there

there argued that the test ought to have been whether the feelings atempted ato be excited were such as to be compatible with the disposition to render obdience to the lawful aughority of the Government and to support that authority against unlawful attempts to subvert it. That test does not wander so far from the texpress language of section 124A as it then stood, as the test which the Federal Court has now laid down, but even so the Privy Council showed no disposition to accept it. The judgment of the Privy Council delivered by Lord Halsbury was as follows

"Their Lordships are of opinion, taking a view of the whole of the summing-up, which is of very great lenghth, that there is nothing in that summin-up which calls upon them to indicate any dissent from it or necessity to correct what is therein contained, looking at the summing-up as a whole, and looking at each part of what was said by the light of what else was said. Speaking genera lyof the argument which has been presented to their Lordships, they are of opinion that no case has been made not consistently with the rules by which their advice to Her Majesty has been hiterto guided ingiving leave to appeal in criminal cases; and, therefore, they will humbly advise Her Majesty that this is not a case in which leave should be grantd."

9. The second case is Anni Besant v. Emperor (1916) 39 Mad. 1085. That case turned upon theinterpretation of section 4(1) of the Indian Press Act, 1910. The section relates to the use of a printing press for the purpose of printing or publishing ~~nay~~ any newspaper, book or document containing any words, signs or visible representations which are likely or may have a tendency directly or indirectly. whether by inference, suggestion, allusion, metaphor, implication or otherwise to bring into hatred or contempt HisMajesty or Government established by law in British India In that case Ayling J. had the following observations to make:-

"As regards the words "hatred" and "contempt" werare asked by the petitioner to hold that only such hatred and contempt are contemplated inclause (c) as would lead to the commission of the crimes referred to in the other clauses of the section, e.g. murder, violence, resistance to the law, intimidation of public servants andothers. I cannot find a shadow of justification for such an argument. Hatred and contempt are prefectly intelligible words: but it is impossible to say what degree of hatred and contempt wold be sufficient to lead diffenent people to commit diffenrent crimes, andthere is no ground for giving them such a limited meaning. No case has been quoted to us in which any Coury has applied such limitation even in construcing the old section 124A of the Indian Penal Code before the amendment of 1898. The word therein used was "disaffection" and I need only refer to the exhaustive discussion of the matter by Strachy J. in Queen Emperor v. B.G.Tilak."Disaffection" (which word is also found in the section wearare construing in addition to "hatred" and "contempt") was held to mean hatred, enmity, dislike, hostility, contempt and every form of ill-will towards the Government. The amount of intensity of the disaffection was held to be absolutely immaterial as

immaterial as regards the question of punishment. The terarned Judge Says:.

"I am aware that some distinguished persons have held that there can be no offence against the section unless the accused either connsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the sectiam itself which as plainly as possible makes the exciting or attempting to excite certain feelings and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance tthe test of guilt."

The larned Judge" charge to the jury in that case contains an exhaustive discussion of the law of sedition; and I selected for quotation and relly on it with the more confidence because it was substantially approved by their Lordships of the Privy Council in dismissing an appeal specially allowed against the conviction in that case and based very largely on the ground that there had been misdirection on this very point meaning of the term'disaffection'. It is not suggested that the subseqneut alteration of the law was in the direction of relaxation or less stringency. Section 124A of the Penal Code was was prectically recase so as to make it clear that Strachey J's interpreation of the law was correct. (Vide Manyne's Crminal Law of Indiam 4th edn. p. 298(."

Although the judges of the Madras High Court held that this section of the Press Act went beyond the provisions of section 124A of the Penal Code, they had that section of Penal Code constantly in mind and if the test now in question could have been applied to the words"hetred" and contempt" inthe Penal Code they would not have hesitated, I think, to apply that meaning to those words in the rress Act. In the judgement of the two other Madras .udges there is nothing to suggest that they disagree with the above interpreation of Ayling J. This case too went up to the Privy Council. The appeal was dismissed and Lord Phillimore in dalivering the judgement of the Board said "Union careful perusal of the several judgemnts their Lordships find that weight has been properly given to the several portions of the section. The do not find that the section has been misconstrued". (43)Mad. 165.

10. so far as I know the above two judgements have not yet been disented from. Theyseem to be clear authority for the view that the language of section 124A of the Penal Code is to be given its plainin meaning in respect of a charge of exciting feeling of hatred and contempt against Government.

P.T.O.

There is no warrant in the law in India for the view that an offence has been committed only whenwriter intends intends to excite public discorder or when there is a likehood of public disorder. I am not sure whether the Federal Court is laying down its notion of sedition in disregard to the previous whether it is professing to nterpret the case law. It does profess to be stating "the broad principles underlying the conception of sedition as an offence against the State", and that after examining " a great number of judicial pronounchements" That is not a very clear indication of the Court's view of its function in this case. No doubt the Federal Court is more than an interprter of the law. But in this case, at any rate, there seems to be an alarming tedency to discregard the plain language of the statute and to substitute for the law of sedition personal views of what the law should be. Moreover, it is astonishing that in effecting such a change in the law of sedition applicable to India the Federal Court has not thought fit to discuss the case law in detail or even the question how far the law of sedition in England appliesto India. The two cases cited above which have the authority of the Privy Council behind them were not even mentioned. Particular attention should, I think be paid to the fact that the amendment of section 124A of the Penal Code in 1898 was, as pointed out by Ayling J. meant to ensure that Strachey JK's view of disaffection should be the law in India and hence amoung other changes the words 'intred' and 'contempt' were added. Seedhes by Government spokesmen at the time show clearly that the Government's diresire was to have a particular law of sedition for India, whether or not it was the English law. (See generally the speeches quoted in Chapter VII of Donough's Law of Sedition, 1911 (. The following quotation from a speech by Sir Alexander Mackenzie, Governor of Bengal is very much to the point:

"Much of the outcry against the present Bill rests upon its supposed divergence from the law of England on seditions libel, and on the assertion that the law as settled in 1879 was sufficient and ought to be final. How I venture to assert these two propositions- first, that the law of England, built up up by judicial reulings to meet the circumstances of a homogenous people directly interested in and sharing in its own government, it not necessarily a norm to which the law of India ought strictly to congorm; and second, that the condtions of the country have themselves so altered since 1870 that the waht was adqquate then is not necessarily adquate now. As to the first point - If the section is in strict accord with the English law, all, criticism of it loses weight; if it is not there is in the very great difference in the conditions of the two courtiesw ample justification for any deviation from the English law necessary

English law necessary for effectively checking the offence of sedition in India. It is clear that a sedition law which is adequate for a people ruled by a government of its own nationality and faith be inadequate, or some respects unsuited, for a country under foreign and inhabited by many races, with diverse customs and conflicting creeds. It is, impossible in India to accept the test of direct incitement to violence or intention to commit rebellion, and limit the interference of the Government to such cases. It is not the apparent intention of the writers of speakers so much as the tendency of the writings or speeches which has to be regarded, and the cumulative effect of depreciatory declamation on the minds of an ignorant and excitable population to be taken into consideration."

The Honourable Member in charge of the amending Bill said:-

"Then it is urged that the proposed clause goes further than English law, and again some passages in Sir James Stemphen's speech are referred to. All I can say is this If in 187C he thought that an appeal to force was a necessary constitutent of sedition, he afterwards changed his minds. After he had served on the Criminal Code Commission which was composed of some of the most distinguished judges of modern times, he published his Digest of the English Criminal Law. In Act,96 of the Digest he states the English law in the clear and precise terms which I read to the Council on the 21st December. There is nothing in that article, and there is nothing in the almost identical article framed by the Criminal Code Commissioner to suggest that an appeal to violence is a necessary factor in the offence. I take it that the offence is complete, both in India and England, if it be proved that the offender has attempted to excite disaffection towards the Government. It is not necessary that he should himself appeal to force. What he does in to excite is to excite or attempt to excite feelings of descontent which make people ready for mischief should be opportunity arise."

11. Apart from the question wnether the test laid down by the Federal Court is in accord with the English and Indian law of sedition, the test is open to objection on general grounds as has been pointed out by Secretary, H.D. In regard to section 124A of the Penal Code the gist of the offence sedition in 'intention and not 'likelihood'. The same is the case in English law. Not only does the person who brings Government into hatred or contempt commit an offence, but also a person who attempts to bring into hatred or contempt. In Reg. V. Burns (1896) 16 Cox. 355 Cave J. said: "It is one thing to write or speak with a distinct intention to produce distrubances, and another to write or speak violently and recklessly of what is likely to produce disturbances." In that case the accused were acquitted who alleged to incite the public to riot had it

fact had in fact taken place immediately after the accused's speech if likelihood had been the test, there is little doubt the accused could have been held guilty. In Queen Empress v. Laxman, 1900, 2 B.L.R. 286 Jenkins J. addressed the jury as follows:

"Gentlemen, I have described to you these hostile feelings indicated in section 124a, and what I next proposex to do is to ~~ask~~ or to consider the relation they bear to the offence. Now the offence described in this section is committed not only by by him who actually calls the hostile feelings into existence but also by him who attempts to call them into existence. As the case has been put before you and formulated by the Advocate General it is not suggested that the publications in question have in fact resulted in the creation of these feelings of hostility, what is said that the offending articles evince a clear attempt to create these feelings. It is no defence to urge that the accused has failed in his endeavour; if you are satisfied that the attempt was those to whom he may have addressed himself either been too discreet ortoo temperate to act upon the obvious meaning of his teaching."

There is no doubt that for disovering a persons intention often the only clue is to be had by ascertaining what was the result or what was the likely result of his action. Thus, when the accused is specifically charged with inciting disorder, it is legitimate to ask whether there was disorder or there was likely to be disorder. When the accused is charged with inciting to disorder, fact that disorder followed would often be conclusive evidence of his seditious intent. But it is not necessary that there should be disorder or even the likelihood of disorder. If he intended to incite disorder, it is immaterial whether disorder followed or not. A likelihood of disorder and the circumstances of the time are an indication only to the writer's intention, They do not deter ine whether an act is an offence or not. Similarly when the accused is charged with inciting feelings of hatred or contempt against Government, it is legitimate to ask whether he did excite these feelings or whether in the circumstances of the offence there was likelihood of his exciting those feelings. These question would yield some indication of his intention. But it seems irrelevant to ask whether there was a likelihood of public disorder. It is simplifying things overmuch to hold that because where a Government is held in general hatred or contempt, anarchy or disorder must follow therefore an absence or an unlikelihood of public disorder is a sign that no hatred or contempt has been excited and therefore no offence

and therefore no offence committed. The person to whom the words were addressed may have been too timid, too temperate, too well-policed, too shrewdd or too few, to indulge in public disorder. Courts in England may be prepared to accept the test of intention to excite disorder as a test of all types of seditious libel. It is hard to imagine how they could accept likelihood of public disorder as the test. The position in Indian law has from 1898 been so far free from doubts: when the accused is charged with bringing into hatred or contempt the Government or His Majesty, the test whether of intention to create public disorder or the likelihood of public disorder had been decisively rejected previous to the Federal Court's judgement. It is not necessary here to consider whether on political gounds the Federal Court's notion of sedition is certainly not the law in India. The Court was hardly justified in forsaking the plain language of both section 124 A of the I.P.C. and clause (e) of rule 34(6) of the D. of I. Rules and substituting its own notion: The case also raises a question how far the Federal Court is bound by decisions of the Privy Council.

12. Further, it could hardly be maintained that to vilify His Majesty was not sedition even when there was no risk of public disorder. The relevant words of section 124A of the Indian Penal Code are brings or attempts to bring into hatred or contempt Her Majesty or the Crown Representative or the Government established b law in British India." In that case when a person is accused of seditious libel against His Majesty the words 'hatred and contempt' would have to be interpreted differently from the way in which they are interpreted when the person is accused of seditious libel against the Government. And finally, the argument which the Federal Court accepted was expressly urged before and rejected by the Privy Council in Wallace-Johnson v. The King, 1940 A.C. 231, a case from the Gold Coast where the provision under consideration was, in relevant particulars, couched in language similar to that of section 124A In delivering judgment of the Board, the Lord Chancellor said:

"The elaborate structure of section 330 suggests that it was intended to contain, as far as possible, a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from anv expositions, however authoritative, of the law of England or of Scotlan ..... Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result, and their Lordships are unable to import words into section 330 which would be necessary to support the appellant's argument." There ob-servations, which do not appear to have been brought to the notice of the Federal Court, apply a fortiori in the construction of the Indian Statue.

It is for the Central Government to decide whether the Federal Court's view should be acquiesced in or challenged in some other suitable case. If the Federal Court's ruling has given rise to practical difficulties the administrative department would be well advised to move the Central Government for amendment of the Defenc of India Rule. But before doing so the Advocate General should, I think, be consulted

Remembrancer of Legal Affairs.

U.R. to H.D., No. 6609 , dated the 30th September 1953.

SSM / 30/8/56.

Office of the R.L.A.

L	15	22

The question for the consideration of the R.L.A. is whether the Bombay Cotton Cloth Dealers Licensing Order, 1943, applies to the cloth shops run by the Excise Department in West Khandesh.

2. The Crown in not expressly or by necessary implication named in the Bombay Cotton Cloth Licensing Order, 1943. Consequently that Order will have no application to cloth shops opened by the Excise Department in West Khandesh. No license would therefore be necessary for sale of cloth by such shops.

sd/- P.N.M.
21/10

Remembrancer of Legal Affairs.

U.R. to F.D. (Supply), No.7073, dated the 23rd Oct.1943.

smc/30-8

No. 28 of 1943.

ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT,

Bombay, 27th October 1943.

U.R. No.6888 dated 15th October 1943.

[L - 15 - 26]

OPINION.

The view taken by the Federal Court in its judgment in the case of Niharendu Dutt Majumdar V. Emperor reported in A.I.R. Federal Court 1942 page 22 is in my opinion, with all respect to the Federal Court, one which should not be acquiesced in but should be challenged in a suitable case and be taken to the Privy Council. I argued before the bench of the Bombay High Court the case of the Janma Bhoon which published extracts from the letter of Dr.Shyam Prasa Mukherjee. Of course so far as the Bombay High Court was concerned the judgment of the Federal Court was the last word on the subject and it was not possible in the face of that judgment to urge any contentions to the contrary.

I do not think on a proper reading of the whole - judgment of the Federal Court, it is correct to say that the Federal Court has laid down that intention is the gist of the offence under Clause (e) of Rule 34(6) of the - Defence of India Rules just as it is in respect of the offence under Section 124(a) of the Indian Penal Code. Although there are passages in the judgment which appear to be more widely framed than would be correct, I think on the whole it is clear that what the Federal Court was dealing with was not a question of intention on the one hand and tendency on the other, but the nature of the acts on which the offence is founded. This is clear from the portion of the judgment which says that the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency. I am inclined to think that by the

judgment in question, the Federal Court has not linked the offence under Clause (e) of Rule 34(6) of the Defence of India Rules with the offence of sedition under Section 124(a) of the Indian Penal Code to the extent that intention must be the gist of the offence in both cases., There is no doubt however that the judgment of the Federal Court is capable of being interpreted in that manner.

The more serious aspect of the judgment is in the dictum that public disorder or the reasonable anticipation or likelihood of public disorder is the gist of the --- offence. The Federal Court has in my opinion not tried to interpret Clause (e) of Rule 34(6) or Section 124(a) of the Indian Penal Code as they exist, but has tried to apply what they believed to be the law in England as being the law in India also. The Summing-up of Strachey J. in 22 Bombay L.R. stood the test of scrutiny by the Privy Council. It will be noticed that the decision in that case was prior to the amendment of Section 124A which was effected in 1898. Again in the case of Annie Beasant V. Emperor, which was under the Indian Press Act, 1910, the judgments of the judges of the Madras High Court were before the Privy Council in I.L.R. 43 Madras page 146 and at page 165 L. Phillimore observed that in those judgments eight had been properly given to the several portions of the section under the Indian Press Emergency Act and they did not find that the section had been misconstrued.

No reference is made in the judgment of the Federal Court to the Privy Council. Case of Wallace Johnson V. The King 1940 A.C. page 231. The defination of seditious intention in the Criminal Code of Gold Coast colony is - similar to the wording in Section 124(a) of the Indian - Indian Penal Code and Clause (e) of Rule 34(6) of the Defence of India Rules. Their Lordships of the Privy --- Council negatived the contention that the prosecution could not succedd unless the words complained of were themselves of such a nature as to be likely to incite violence, and

unless there was positive intrinsic evidence of seditious intention. Their Lordships observed that there was close correspondence at some points between the terms of the Section of the Code and the statement of the English Law of Sedition by Stephen J. in the Digest of Criminal Law, which was quoted with approval by J. Cave in case of Reg. V. — Burns & Others. Viscount Caldecote L.C. then went on to say:- "The fact remains however that it is in the Criminal Code of the Gold Coast Colony and not in English or Scottish Cases that the Law of Sedition for the Colony is to be found. The Code was no doubt designed to suit the circumstances of the people of the Colony. The elaborate structure of Section 330 suggests that it was intended to contain as far as possible a full and complete statement of the Law of Sedition in the Colony. It must, therefore, be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions, however, authoritative, of the Law of England or of Scotland." The judgment then proceeded to state that there was nothing in the Section under consideration to support the appellants' contentions.

I am of opinion that the approach by the Federal Court to the decision on the question was contrary to the principles laid down by the Privy Council in 1940 A.C. page231. The Defence of India Act and the Rules thereunder are — temporary measures. The Indian Penal Code is a permanent measure. The Ruling of the Federal Court affects the construction of Section 124(a) as much as the construction of of Clause (e) of Rule 34(6) of the Defence of India Rules. I am clearly of opinion that if it is possible to do so the Ruling of the Federal Court should be taken before the Privy Council or in the alternative necessary amendments should be made in the Defence of India Rules and in the Penal Code

sd/- U.P.E.

Advocate General.

Office of the R.L.A.

The question for R.L.A.'s consideration is whether the article under the caption "Military held for appeasing hunger" published in the issue of the Lokamanya dated 30th October 1943 comes within the purview of clauses (e), (ee) or (g) of rule 34(6) of the Defence of India Rules.

2. In the article the author states that the anxiety about the situation in Bengal is growing not on account of the famine there, but on account of the measures which Governmen is about to enforce. In the author's opinion the Viceroy's intention in utilising the military for famine work is not to solve the political deadlock but only to rule with the power of the military. The author regards with suspicion and misgiving the grafting of military administration on the civil administration of Bengal. He believes that this is done with a view to hushing up the figures of deaths by starvation and thereby saving the face of Government. He apprehends that the letting loose of the military in village areas would frighten the villagers, particularly as no assurance is forthcoming regarding the good behaviour of the Forces. The author then draws a parallel between the Military Government imposed inItaly for the purpose of striking awe amongst the conquered people and the Military Government sought to be imposed in Bengal. He goes further and states that the Bengal Ministry in securing military assistance for the distribution of grain in the villages has lost all credit and honour and that the main object behind the despatch of the military into the rural areas of bengal is maintenance of law and order in view of the impending offensive against Burma.

3. The article read as whole appears to be objectionable as it gives alarmist and distorted version of the measures taken by the Government of India for the speedy and more effective distribution of food in the famine stricken areas of Bengal. It imputes ulterior and not altogether

honest motives to the Viceroy in using the military for relieving distress caused by the famine. It seems to bring into hatred or contempt or to excite disaffection towards the Government of India and his Majesty's Forces; and although the alarmist passages may be not be strong enough to bring it with in the purview of clause (g), the other objectionable passages would, in my opinion, come within the mischief of clauses (e) and (ee) of rule 34(6) of the Defence of India Rules.

Id/- R.N.M.
9/11

Remembrancer of Legal Affairs.

U.O. to H.D.(Spl.)No.8208, dated the 9th November 1943.

R.D.P.
30/8/56.

S.C.

Office of the R.L.A.

A tenant has in his possession two bed rooms, one sitting room and a hall. He would like to have a paying guest in one bed room and has accordingly requested the G.D. to let him know whether it is necessary for him to obtain the Landlord's permission under the Bombay Rent Restriction Order, 1942, as amended by G.N.G.D., No.3259/33 dated 13th September 1943. The G.D. has taken the view that the proposed keeping of a paying guest by the tenant concerned would not be covered either by the Rent Restriction Order, 1942, or the Hotels & Lodging Houses Control Order, 1942 or the Bombay Rent Restriction Act, 1939. The R.L.A. is requested to advise whether this view is correct.

2. Clause 8 of the Bombay Rent Restriction Order, 1942, runs as follows:-

> "The landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this Order and performs the other conditions of the Tenancy:
>
> Provided that nothing in this clause shall apply where the landlord has obtained a certificate from the Controller certifying that the tenant has committed any act contrary to the provisions of clause (c) or clause (g) of section 108 of the Transfer of Property Act, 1882, or has been guilty of conduct which is a nuisance or an annoyance to any adjoining or neighbouring occupiers, or that the premises are reasonably and bona fide required by the landlord either for his own occupation or for the occupation of any person for whose benefit the premises are held or for any other cause which may be deemed satisfactory by the Controller.
>
> Explanation.- The fact that a tenant has after 13th September 1943 sublet the premises without the written permission of his landlord shall, notwithstanding anything contained in any law for the time being in force be deemed to be a satisfactory cause within the meaning of the proviso to this clause."

3. The Explanation was recently inserted in the Order by G.N.G.D., No.3259/33 dated 13th September 1943. A draft Bill to amend the Bombay Rent Restriction Act, 1939, for the purpose of adding a similar Explanation to section 11 of the Act has already been published for the information of the public.

4. The first question for the R.L.A.'s consideration

is whether keeping of a paying guest by a tenant would be tantamount to subletting the premises within the meaning of the Explanation to clause 8 of the Bombay Rent Restriction Order, 1942 and, if so, whether a written permission of the landlord would be necessary. The word "guest" means a person received and entertained at the house of another; a visitor; a lodger or boarder, (See Standard Universal Disctionary). "Boarder" is one who gets his meals or both meals and lodging in the house of another for a price agreed upon. (Iyer's Law Lexicon, 144 and Black's Law Dictionary, p.230 A lodger is one who temporarily inhabits a portion of a house of which another has general possession and capacity. (Wharton's Law Lexicon, p.252). In R.L.A.'s opinion No.4596 dated 4th June 1942, the G.D. was advised that "the proprietor does not really sublet the premises to a lodger. What he does is to charge the lodger for accommodation supplied. The charges may be either inclusive or exclusive of board." The same remarks will apply to a paying guest. The charges paid by a paying guest cannot be regarded as rent as commonly understood, and consequently the relations between the tenant and his paying guest could hardly be deemed to be those of landlord and tenant. There would thus be no necessity for a tenant keeping a paying guest to obtain the written permission of the landlord under the Explanation to clause 8 of the Order. The position would be the same under the Bombay Rent Restriction Act, 1939, after the Explanation is added to section 11 as proposed in the draft amendment Bill published for general information.

5. The next question for consideration is whether a person keeping a paying guest can be said to be "the manager of a hotel" or owner of a lodging house" within the meaning of the Hotel's & Lodging Houses Control Order, 1942. Ordinarily a hotel or a lodging house connotes a place where the proprietor makes it his business to furnish food or lodging or both to travellers and other persons. It will not include a private house where the occupant takes in occasional lodgers or paying guests upon special consideration to supplement his income. Unless, therefore, it can be established that a established that a person uses the place for his own

regular business of furnishing food and lodging or both to travellers and other persons, he cannot be deemed to be a manager of a hotel or owner of a lodging house.

Id/- P. N. L. 10/11

Remembrancer of Legal Affairs.

U.N. to G.D., No.8331, dated the 11th November 1943.

R.D.P.
30/8/56

S.C.

Office of the R.L.A.

It appears that by an indenture of agreement dated 17th April 1942 Mr. Frank had taken over the premises of Sir Shah Nawaz Bhutto for a period of five years from 1st June 1942 with option to renew the same for a further period of five years, one of the conditions being that the lease would not be assigned by the leasee without the previous consent of the lessor. Certain differences arose between the parties and eventually a suit No. 962 of 1942 for ejectment was filed in the High Court by the lessor. Then parties however came to settlement and the High Court passed on 16th September 1942 a consent decree ordering the plaintiff (leassor) to grant and the defendant (lessee) to accept a lease of the premises upon and pursuant to the terms and provisions of the agreement dated 17th April 1942 as varied and modified as therein provided and that a lease be executed by the parties in duplicate. No lease was, however, executed by the parties. On 16th December 1942 Government issued an order requisitioning these premises and that order was served on Mr. Frank on 17th December 1942 requiring him to ~~xxx~~ vacated the premises on 1st January 1943. It appears that on 23rd December 1942 Mr. Frank intimated the Collector of Bombay about the assignment of the lease to Mr. Loke Chan Hing requesting him to cancel the order of requisition, but the Collector refused his request. In the mean time Mr. Frank requested the lessor to give him permission to assign the lease to Mr. Loke Chan Hing as provided by one of the terms of the Lease; but the permission was refused. By another consent decree dated 13th January 1943 Mr. Frank's tenancy of the premises was terminated at the end of December 1942. Mr. Frank has now given notice to the Collector of claim for compensation on the following grounds;-

His agreement to sell his business to Mr. Loke Chan Hing was made on 9th December 1942. The requisition order was made on 16th December 1942 and served on him on 17th

17th December 1942. His request to the Collector to cancel the requisition order was refused on 20th December 1942 giving him no alternative but to approach the lessor to terminate the lease and to refund the deposit. The premises were occupied by the military on 1st January 1943 but it was not until 13th January 1943 that the adjustment of the consent decree on the above mentioned basis was arrived at and recorded in the court. It was only on the 13th January 1943, several days after the property had not only been requisitioned by actually taken possession of by Government that his right under the consent decree including the right to obtain a lease came to an end. He is therefore entitled to compensation on the basis of loss of bargain with Mr. Lone Chan Ring. If not, he is at least entitled to compensation for the closing down of business and consequent loss of property which he estimates at Rs.5000/- per month of which rate for ten years, the period of his lease his claim would amount to Rs.600,000/-.

He prays that should Government however be not disposed to admit his claim, an arbitrator for the adjudication of his claim may be appointed under the provisions of the Defence of India Act.

The questions raised for the consideration of the R.L.A. are:-

(1) Whether Mr. Frank has any valid claim for compensation;

(2) Whether an arbitrator should be appointed under clause (b) of section 19(1) of the Defence of India Act; and

(3) Whether the amount of compensation should be paid into court.

Question (1).- Section 19(1) of the Defence of India Act provides for payment of compensation in accordance with the principle for compulsory acquisition of immoveable property in cases where by or under any rule made under this Act any action is taken of the described in sub-section (2) of section 299 of the Government of India Act, 1935. A person is entitled to compensation under this provision for requisition of his property under rule 75A of the Defence of India rules. Such person may include all those who have an interest in the requisitioned land. Obviously, therefore, no person who is not possessed of any interest in the land on the

land on the date of its acquisition would be entitled to any compnsation. By the second consent decree dated 13th January 1943 Mr. Frank's lease of the presmises in the present case was terminated at the end of December 1942. The premises were requisitioned with effect from 1st January 1943. It is, therefore clear from these facts that Mr. Frank possessed no interest in the premises on 1st January 1943 i.e. the date of requisition to entitle him to any compnesation. His claim for compnesation either for failure of his contract with Loke Chan Hing or for loss of business appears to be based on the assumption that he was demnified by the order of requisition. That assumption is entirely wrong. It would appear from Sir Shah Nawaz Bhutto's letter at page 29 ante that the real reason for termination of the lease at the and of December 1942 was not requisitioning but because the landlord had refused to grant permission to transfer the business to Loke Chan Hing Even assuming that requisitioning had directly or indirectly precipitated termination of the lease, section 17(2) ofthe the Defence of India would be a completed answer to any claim of compensation of the kind made by Mr. Frank. Consequently Mr. Frank's claim for comensation is not tenable.

Question (2). Section 19(1) of the Defence of India Act provides for payment of compensation in accordance with certain principles for compulsory acquisition of immoveable property. Clause (b) of section 19(1) lays down that where the amount of compensation cannot be fixed by agreement the Central Government shall appoint as arbitrator a person qualified under sub-section(3)of section 220 of the Government of India Act, 1935, for appointment as a judge of a High Court. Under rule 2 of the Rules framed by the Central Government in exercise of the powers vested under sub-sections(2) and (3) of section 19, when the amount of compensation cannot be fixed by agreement under cualse (a) of sub-section(1) of section 19 the person to be compensated may submit an application

P.T.O.

the provincial Government. It is apparent from these provisions that an abbitrator can be appointed for the purpose of determining the amount of compensation and not for the purpose of determining the validity or otherwise of the claims of the contending parties to shre the compensation. This inference is supported by the following observations of the Government of India in its letter Defence Department No. 17(DC)4/43 dated 15th February 1943; "The Government of India consider that under section 19 of the Defence of India Act as it stands, an arbitrator is appointed for the purpose only of determing the amount of compensation apyable by Government and has no juzdiction to decide disputed as to ownership. In most cases however where the ownership is in dispute the amount of compnesation payable would not be depdent on who the owner is; and in such cases it is suggested that the arbitrators should record a formal order determing the amount payable. It would thereafter be open to Government to deposit the amount in Court." In the present case the premises were requsitioned with effect from 1st January 1940 by which date Mr. Frank's lease of the premises had terminated. Consequently Mr. Frank is not entitled to any compensation. It is not the amount of compensation that is dispute but the claim itself of Mr. Frank for compensation. consequently it does not appear necessary to appoint an abbitrator under clause (b)of section 19(1) of the Defence of India Act.

Question (3). Mr. Frank has prima facie no valid claim for compensation. Nor does he dispute the claim of sir Shah Nawaz Bhutto to full compnesation. In the circumstance the question of paying the amount of compnesation into Court does not appear to arise.

Sd/
15/11

Remembrancer of Legal Affairs.

U.R. to R.D.No. 8458 dated the 16th November 1943.

M.R.D
30.8.66

Office of the R.L.A.

Clause 10B which was inserted on 13-2-1943 in the Newspaper Control Order, 1942, provides that no person shall print or make or publish except under the authority in writing of the Central Government any newspaper that was not both printed or made in British India and published in British India before the date of this notification. "Newspaper" as defined in clause 2(a) of the Order means any periodical publication containing news or comments on public news (i) printed wholly or in part on newsprint and (ii) published at intervals of not more than fifteen days. "Newsprint" as defined in clause 2(b), has the same meaning as in the Newsprint Control Order, 1941. Clause 2(b) of that Order defines "newsprint" as meaning white printing paper in reel or in sheets the fibre content of which comprises not less than 70 per cent of mechanical wood pulp. In the present case it is no doubt true that the "Prabhat" was printed and published after 13-2-1943 i.e. after clause 10B of the Newspaper Control Order came into operation; and as it is a daily newspaper condition (ii) in clause 2(a) of that Order is satisfied. But it is not known whether condition (i) is also satisfied i.e. whether it is printed on white printing paper in reels or in sheets the fibre content of which comprises not less than 70 per cent of the mechanical wood pulp. Finance Department (Supply) should therefore ascertain whether condition (i) in clause 2(a) of the Newspaper Control Order is satisfied before launching a prosecution under rule 81(4) of the Defence of India Rules for contravention of clause 10B.

2. If on enquiry it transpires that the "Prabhat" is not a newspaper as defined in clause 2(a) of the Newspaper Control Order, 1942, then a prosecution would be competent under rule 81(4) of the Defence of India Rules for contravention of clause 3(a) of the Paper Control Order.

Id./ P.N.N. 22/11
Remembrancer of Legal Affairs.

U.R.* to F.D. (Supply) No. 8642, dt. 22nd November 1943.

Office of the R.L.A.

The meaning is apparent from the context. The words "any place out of obviously go with "exported to" and not with "imported into". Commas after "into" and "of" would of course have made the meaning clearer.

Sd/- P.N.M.
23/11

Remembrancer of Legal Affairs.

U.R. to F.D. (Supply), No 8693, dated the 24th Nov. '43

C.G.M./30-8

Office of the R.L.A.

The question for consideration is whether non-compliance with an Order issued under sub-clause (b) of rule 26(5B) of the Defence of India Rules is an offence in view of the judgment of the Federal Court the rule 26 was invalid and the consequent issue of Ordinance XIV of 1943. Both the order and the non-compliance in this case took place before Ordinance No. XIV 1943 was made.

2. The Sessions Judge does not dispute the finding of the Federal Court in its judgment dated 31st August 1943 that clause 3 of Ordinance No.XIV is valid and operative. There is no doubt that the Sessions judge would agree that where orders under section 26 have been complied with, the orders are valid and there is no need for a fesh order to authorise Government action, to authorise e.g. a person's detention under rule 26. The Sessions Judge was however dealing with a case where an order under rule 26 had not been complied with and the person was being prosecuted for breach of the order, both the order and the breach being before the issue of Ordinance No.XIV. That type of case does not apper to have been dealt with by the High Courts yet. The Sessions judge held that non-compliance was not an offence at the time he committed the breach in view of the Federal Court's judgment in Keshav Talpade's case and that clause 3 of the Ordinance could not latter make that an offence. That finding is based on the view that at the time of the breach the Ordinance was invalid. The question is whether the Sessions Judge can consider the validity of the Ordinance at any time in the past. There is no doubt that he is precluded from questioning the present validity of the Order. He must hold that at the present time the order is effective e.g. if the accused were still absconding there is no doubt that his action would be an offenc And it seems equally clear that any non-compliance after the date of the issue of Ordinance XIV would be an offence. It is more doubtful whether in respect of non-compliance before

the issue of Ordinance XIV he can consider whether the the Ordinance was valid and effective at the time of the non-compliance. My opinion is that the Sessions Judge is so precluded by reasons of the words "no order..... shall be called in question ....."- I think his view is wrong, although it cannot be lightly dismissed.

Sd/- P.N.M.

25/7

Remembrancer of Legal Affairs.

U.R. to H.D.(Spl.), No. 8758, dated the 26th November 1943.

C.G.R./30-8

59

Office of the R.L.A.

No appeal against the order of acquittal passed by the Sessions Judge, Dharwar, appears necessary if the intention is merely to obtain an authoritative decision of the High Court on the points at issue since the decision of the High Court in the appeal filed against the order of acquittal in the Belgaum case would serve the purpose.

Sd/- P.N.M.

1/12

Remembrancer of Legal Affairs.

U. R. to H.D. (Spl.) No 368/conf 1st Dec. 1943

63

Office of the R.L.A.

The view of H.S.G.D. that the Controller is entitled for the purposes of an enquiry under clause 3 of the Hotels and Lodging Houses Control Order, 1942, to enter upon the premises himself, is correct.

Sd/- P.N.M.

30/11

Remembrancer of Legal Affairs.

U.R. to G.D.No. 8867 dated the 1st December 1943.

C.G.R./308

Office of the R.L.A.

The question for the R.L.A's consideration is whether commission agents who purchase or sell cloth for their constituents are dealers within the meaning of caluse 2(b) of the Bombay Cotton Cloth Dealers Licensing Order, 1943,

2. As regards the issue of license the above question would necessarily airse. because it appears from the provisions of the Order that no one but a dealer is to obtain a license. Caluse 2(b) of the order defines "dealer" as " a person carrying on the business of selling or storing for sale cloth, whether wholesale or retail whether or not in conjunction with any other business and includes a hawker. " In regard to commission agent the question arise whether sale by agents was sale within the meaning of that definition. It would depend on the terms of the contract between the principal and his agent. Further in deciding whether an agent was a dealer it would be relevant to enquire whether the agency habitually bought and sold cloth or whether his purchase and sale of cotton cloth was merely a small fraction of his business, I am inclined to think that in the majority of cases a commission agent is not a dealer, although there might be some cases in which it would appear from the nature of his business that he was a dealer. A more definite answer is not possible in the circumstances

3. As regards a prosecution for contravention of the order, it is not necessary to decide whether an agent is or is not a dealer; for section 3 provides that no person shall sell, or store for sale, cloth except under and in accordance with the conditions of a license granted by the licensing authority. Therefore, at first sight, it would seem that an agent whether or not be is a dealer.

dealer within the meaning of the Order must have a license, or else must refrain from selling. As regards purchase, a commission agent who merely purchases cotton cloth would not thereby doing anything prohibited by the Order. The Order deals only with the sale of cotton cloth. As regards the prohibition does not merely affect dealers but any one selling cotton. However in a criminal prosecution of an agent for breach of the Order, the question would arise whether it is the commission agent or his principal himself who sells. For example, the English Licensing Act which controls the sale of liquor provides "no person shall sell e xpose for sale by retail any intoxicating liquor without being duly licensed," In interpreting that section the courts have held that "where a sale is effected by an agent on behalf of a principal, the seller is the principal and not the agent." In a prosecution under the Order an gent would not doubt seek to extend to his own case that decision of English Law. whether he would be successful would depend to some extend upon the terms of the contract between the principal and agent. In brief, as regards the contravention of the Order the Order seems to make necessary a license in all cases of sales. But where the sale is by a commission agent, it is not clear whether it is the agent or the principal who contravenes the Order on both. That is, it is not clear whether the principal or the agent who should possess the license. If it is considered necessary that agent should possess licenses or should defrain from sale, it is desirable to amend the Order to make the matter quite clear.

Sd/- P.N.M.
8/12

Remembrancerof Legal Affairs.

U.R. to F.D. 'Supply) No. 9071, dated the 8th December 1943.

Mjr/30/8

4 Cs.

Office of the R.L.A.

The Order given the Collector the right to refuse an appeal filed after 15 days but it does not preclude him from entertaining an appeal filed after 15 days if in his discretion he decides to do so in a fit case. Further the Government has no power of revision and the Collector's orde is absolutely final. The Limitation Act, 1908, applies if at all only by analogy. That Act does permit extension of the time in certain circumstances. There seems no good reason to make the Order so much stricter in respect of limitation that no discretion is given in any circumstance to extend time.

Sd/- P.N.M.
14/12
Remembrancer of Legal Affairs.

U.O. to G.D. No. 9163, dated the 14th December 1943.

Mjr/30/8/
4 Cs.

Office of the R.L.A.

Without examining the merits of each case, the R.L.A. is reluctant to advise in general terms whether or not the meals provided at clubs and hotels on dance nights would be an infrigment of the F.D. (Supply) Notification No. 390-II-A dated 28th October 1943. Whereas a supper provided at a dance would be a definite infringement of the Notification, it is doubtful if a dinner preceding the dance would be regarded as anything more than a regular feature of all clubs and hotels. Further, special dances and cabarets must be distinguished from the routine dances and cabarets which are a regular feature of club and hotel life and which are more in the nature of amenities provided for the members and residents. I have discussed this question with A (F) and D.C.S (Mr. Bakhle). It would, it seems, be advisable on the whole togrant a permit in the particular case under reference.

Sd/- P.N.M.

c.c. 8/12

R. L. A.

U.R. to D.C.S. (Mr. Bakhle). No 9070 dated 8-/12-43

Mjr/30/8/

4 Cs.

Office of the R.L.A.

The discretion vested in the Rent Controller under the proviso to clause 8 of the Bombay Rent Restriction Order, 1942 to grant a certificate for any other satisfactory cause has been curtailed by the Explanation which makes the issue of a certificate obligatory on proof of the premises being sub-let without the landlord's written permission

Sd/- P.N.L.

Remembrancer of Legal Affairs.

L.R. to G.D. No. 9187, dated 15th December 1943.

Mjr/30/8/

4 Cs.

Office of the R.L.A.

From the letter of Messrs. Mackinnon Mackenzia & Ltd., it appears that some surplus flour from two Hired Transports, which were then in the Port of Bombay, was landed in their bonded warehouse which is under suppervision of the Customs Authorities and all Customs formalities have been duly co,-plied with. It is stated that the flour so landed in intended for supply to Hired Transports. Messrs. Mackinnon Mackenz & Co. desire to know whether besides complying with the Customs formalities, it is necessary for them to comply with civil formalities as well at the time of effecting supplies to Hired Vessels. In the subsequent letter, Managing Agents, Mazagaon Dock, Ltd. state that they received an im-port licence No 3152 J.C. I., J.C.O., dated 21-9-43 from the Chief Import Controller, New Delhi.

2. In view of these facts, the question raised by the Director of Civil Supplies (Mr. Bhale) for R.L.A's consideration is whether the orders issued in F.D. (Supply) Notifications Nos. 11/7-II and 363-II dated 3-7-1943 are applicable to the specified goods deposited or stored in bonded warehouses.

3. The two notifications in question deal with the movement of certain goods. The fact that a bonded warehouse is a termin s or - stage in any particular movement of the goods does not appear to be material, at least in the present case. The question to be considered is the particular movement to which the goods are subjected.

4. Under F.D. (Supply) Notification No. 11/7-II, dated 3rd July 1943 no wheat flour can be removed by road, rail or sea from any place in the City of Bombay to any oth r place in the Province of Bombay outside the City of Bombay except under and in accordance with a license; whereas under F.D. (Supply) Notification No.363-II dated 3rd July 1943 no wheat flour can be brought into the City of Bombay by rail,

road or sea without a license. Neither of these notification will apply to wheat flour removed from or brought into the City of Bombay by or on behalf of Government or under and in accordance with military credit notes F.D. (Supply) notification Nxxx11/ No. 11/7/II dated 3rd July1943 will apply only when these bages are removed from the bonded warehouse to any place in the Province of Bombay by road, rail or sea without a license. It would not apply in the present case. The second notification No. 38)-II dated 3rd July 1943 directs that no person shall bring into the areas specified in Schedule I, by rail, road or sea any quantity of articles specified in Schedule II without a license from the Director of Civil Supplies, or Assistant Director of Civil Supplies or the Licensing Officer in the Office of the Supply Commissioner, Bombay, or where the second proviso applies, from a / Rationing Officer. Messrs. Mackinnon Mackenzie & Co. state that the flour now stored in the bounded werehouse was landed from two Hired Transports which were then in the sea port of Bombay. Part of the area specified in Schedule I is the City of Bombay. The City of Bombay as defined in section 3(10) of the Bombay General Clauses Act, 1904 means the area within the local limits for the time being of the ordinary original civil jurisdiction of the Bombay High Court of Judicature. The ordinary vicil jurisdiction of the Bombay High Court extends to the Bombay Fort. Therefore, if attention is confined to the movement would be between two places within the specified area and not from a place outside the area to place inside it. There is nothing in the papers to show who was responsible for bringing the goods into the Port of Bombay, and it is unnecessary to deal with that point. So far as Messrs. Mackinnon Mackenzia & Co., are concerned in this transaction, no permit under either of the notifications seems to be required. But the facts have not been very fully stated. In particular the import license which is mentioned at page 3 of the file has not been obtained.

o.c. Sd/- P.N.F. 27/12
Remembrancer of Legal Affairs.

U.O. to F.D. (Supply),, No. 9459, dated 27th December 1943.

Clause 9(3) of the Hotels and Lodging Houses Control Order, 1942, states that the decision of the Collector, and subject only to such decision, the order of the Controller, shall be final. The wording does not imply that Controller's order should not come into force till the decision of the Collector is delivered. The Controlle 's order may not on the filing of an appeal to final but it is not made inoperative. In the absence of a stay order, it will be operative while the appeal is pending. The Controller's view is correct and in a suitable case a prosecution may be launched.

Sd/-

Remembrancer of Legal Affairs.

U.R. to the Collector of Bombay. No. 9484, dated 28-12-1943.

Government has given some landlords a notice of warning in the form at page 13 ante which is in these terms: "I am directed by the Government of Bombay to inform you that the flat..... in the above mentioned building which is likely to be vacant in the near future is likely to be requisitioned in the near future by me under the Defence of India Rules and any arrangement that you might make for the letting of the said flat is likely to be set aside by requisitioning." The question for the consideration of the R.L.A. is whether such a warning notice gives the landlord any claim for rent in respect of the periiod intervening between the date of notice or subsequent vacation to the date of requisitioning.

2. Under sub-rule (1) of rule 75A of the Defence of India Rules the power of requisitioning property by an order in writing vests in Government. There is no provision either in the Defence of India or the Rules thereunder requiring any warning notice to be given to the landlord before the order of requisition is actually issued under rule 75A(1). The issue of such a notice would not entitle the landlord to compensation under rule 75A of the Defence of India Rules for the period before requisitioning. Therefore, so far as compensation under rule 75A is concerned, Government does not incur liability by issue of the notice. But it is possible that the notice may cause loss to the landlord and therefore the question arises whether such notice, apart from the question of compensation under rule 75A would afford any cause of action to the landlord. A landlord might think it his duty to communicate the contents under of the notice to prospective tenants and the consequence might be (a) that the landlord would have to rent the premises at a rent less than normal or (b) that the landlord was unable to rent the premises. Since rents are controlled, the first consequence is unlikely. However, it might happen that because of the issue of the notice the landlord, although he made reasonable

efforts, could not rent the premises. In such circumstances the landlord might be able to show that the notice has suggested him in loss." But I do not think that even in that case the landlord would have any legal remedy. "Threats to do or abstain from doing a perfectly lawful act cannot, as I regard the law, be wrongful. A threat to do an act which is lawful cannot, in my opinion, create a cause of action whether the act threatened is to be done by many or by one." Sorrel v. Smith (1925 A.C. 7000) per lord Buck Master. The reason why the notice has been issued us not quite clear. But at any rate it is obvious that there is no question of malice on the part of Government in issuing the notice and that being the case I do not think an action would lie. However it will not be obligatory upon Government to inform the landlord when the premises cease to be likely to be requisitioned. Failure to do so within a reasonable time after the flats cease to be on the "likely list" might give the landlord a cause of action. In present circumstances the issue of the notice is hardly likely to give any trouble to Government, but it certainly complicates the legal position."

Sd/-

Remembrancer of Legal Affairs.

U.R. to R.D. No. 397 Confl, dated the 24th December 1943.

The poem "The Sun has set" on page 6 of the Forum contain cheap and indecent gibes against Lord and Lady Linlithgow. It is however very d-oubtful if it is actionable for it has been held that the use of common abuse cannot be regarded as conveying any such imputation as can in any way harm the reputation of the person towards whom it is used and it does not therefore constitute defamation (1883 T A. W. N. 36 and 167).

2. The article entitled "Pat the bull and kick the lamb" at pages 9-12 is a piece of irresponsible journalism in very bad taste and transgresses the bounds of fair and legitimate comment. Some of the passages are doubtless sufficient to lay the editor open to an action for libel, but as Sir Richard Tottenham rightly observes in his D.O. letter, the circumstances do not make it possible to have recourse to that remedy. The article does not come within the purview of any of the provisions of section 4(1) of the I.P.(E.P.) Act, but it would, it seems, come within the mischief of clause (e) of rule 34(6) of the D. of I. Rules as it tends to bring into hatred or contempt the Crown Representative. At the date of the publication of the article (17th October 1943) Lord LinLithgow had not handed over the reins of office and was still the Viceroy and Crown Representative.

Sd/-

Remembrancer of Legal Affairs.

U.R. to H.D. (Spl)(3), No. 9591, dated 31st December 1943.

The question referred to the R.L.A. for consideration is whether permits are necessary for routine dances when no distribution of eatables takes place, but the normal club dinner precedes the dance.

2. Where the dinner which precedes the dance is the normal dinner then quite clearly it cannot be said to be a dinner in connection with the dance. Thus even if the dance is a function or entertainment within the meaning of the Order, the dinner would not be sufficiently connected to require a permit. Suppers, on the otherhand, are usually directly connected with the dance and would be an infringement of the Order.

Sd/-

Remembrancer of Legal Affairs.

U.R. to F.D. (Supply) No. 9605, dated the 31st Dec. 1943

The question referred to the R.L.A. for consideration is whether Prince of Wales Museum or any other building can be requisitioned under rule 75A of the Defence of India Rules to house the Elphinstone High School whose building has been taken over by the Royal Navy for hospital purposes.

2. Rule 75A provides that if in the opinion of Government it is necessary or expedient so to do for securing the defence of British India, public safety, the maintenance public order or the efficient prosecution of the war. or for maintaining supplies and services essential to the life of the community. Government may by order in writing requisition any property.

3. As would appear from the appended note, the Legislative Department of the Government of India are inclined to the view that it would be lawful for Government to requisition a building for a educational institution whose own building Government has requisitioned for the purposes of defence; and further that this would be so even where the educational institution has been already deprived of its building. The R.L.A. however has taken a different view and the test adopted by him has been to see whether the purpose for which the building proposed to be requisitioned is properly referable to one or more of the objects specified in the rule.

The view taken by the Legislative Department of the Government of India rests on the proposition enunciated in para 1 of Mr. Sundaram's note, namely that no Court can question the opinion of Government formed with reference to rule 75A (1) that it was necessary or expedient for one or other of the purposes therein to requisition certain property. The proposition is however subject to an important qualification namely that the court has jurisdiction to inquire whether the order made is a bona fide exercise of statutory power or merely a colourable abuse thereof. It has been repeatedly

affirmed that where discretionary power has been vested by statute in any authority to be exercised for a purpose pointed out by the statute, the power can only to exercised bona fide for the purpose named and to purport to exercise the power for any ulterior purpose would be no exercise of the discretion given by the statute and therefore ultra vires: Galloway v. Corporation 8th of London (1864) 2 D.J. and S. 213 at p. 239: Maxwell on Interpr tation, 8th edn p. 111. In my considered view the actual use to which the building to be requisitioned is intended to be put must be demonstrably referable to one or other of the purposes specified in rule 75A. This view is fortified by the circumstance that while the rule makes Government's opinion conclusive as to the necessity or expediency of the requisitioning, Government if not constituted the sole judge as to whether or not any particular matter falls within one or other of the purposes specified in the rule. The decision of the English Courts with reference to the emergency legislation during the last war furnish the principle which would apply to this case. namely that where the bona fides Government in making an order under rule 75A are challenged the Court would be entitled to take into consideration the intended use the requisitioned building is to be put to and determine whether that use can be said fairly reasonably to relate to one or other of the purposes mentioned in rule 75A. Therefore, with due deference to the view taken by the Legislative Department of the Government of India, it seems to me that the opinions hitherto given by the R.L.A. are in accordance with principle and authority a proper construction of the language in which rule 75A is coushed the requisitioning of a building for the purpose of accomodating a school cannot be deemed to be either necessary or expedient for the purpose of maintaining a service essential to the life of the community or for any of the other purposes specified in the rule. The circumstance that the School's own building has had to be requisitioned and made over for a purpose which is undeniably defence would seem to have little bearing on the question at issue. It is extremely doubtful whether it would be possible to support in a court of law an order rule 75A requisitioning a building for accomodating the School.

U.R. No. G.D. No. 7898 Sd/- 3rd Nov. 43

D.O.No.86-S.O/43.
Legislative Department,
New Delhi, 20th Sept. 1943.

My dear Murdeshawar, Esq.,

In accordance with your D.O.No. 197-L dated the 17th September 1943. I am sending herewith a copy of the opinion you require. You of course know that the opinions given by this Dept. are Confidential. The copy of the opinion sent herewith is, therefore, meant for the personal use of yourself and the Officers of your Department only.

Yours sincerely,

B.G.Murdeshawar Esq.,
Assistant Secretary,
Legal Department,
Council Hall,
POONA.

Defence Department file No.1646-OR/42

Several high judicial authorities can be cited in support of the proposition that no court can question the opinion of Government formed with r efere nce to rule 75A(1) that it was necessary or e xpedient for one or other of the purposes specified therein to requisition certain property. The Government's opinion is final and conclusive and the owner of the requisitioned building will not in my opinion, succeed in s etting aside a r equisition order on the ground that on a proper consideration of the circumst ances the Government ought not to have formed that opinion.

2. Where Government wants an educational buil ding for purposes which a re unquestionablu "defence" and considers it necessary orexpedient to provide the educational institution with another building I mysel see no legal, or even conscientious, objection to the Government holding the opinion that it is necessary to requisition both the building (assuming that the educational building is private property), and a fter requisition, a lloting the s econd building to the educ ational institution. Even in the other case where the educational institution has already been deprived of its building, the Government may f airly hold that it is expedient for maintaining an essential s ervice to provide that institution with another building and proceeding and proceeds to requisition one.

K. Sunderam,
27-11-422

The position adopted in paragraph 1 of Mr. D Sundaram's note is fully established and the question is one of the conscience of Government, themselves. O On this acpect I agree with paragraph 2 of Mr.Sunda rma's note.

G.H. Spence,
28-11-42.

S.S. (ultan) Ahmed 30-11-42.